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No. 91-794

IN THE

Supreme Court of the United States

October Term, 1992

HENRY HARPER, *et al.*,
Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF JAMES B. BEAM DISTILLING CO. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MORTON SIEGEL
MICHAEL A. MOSES
RICHARD G. SCHOENSTADT
JAMES L. WEBSTER
SIEGEL, MOSES, SCHOENSTADT & WEBSTER
10 East Huron
Chicago, Illinois 60611
(312) 664-8998

JOHN L. TAYLOR, JR.
VINCENT, CHOREY, TAYLOR & FEIL
A Professional Corporation
Suite 1700
The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

Counsel of Record for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
ARGUMENT	3
Once the question of choice of law is answered in favor of pure retroactivity, states cannot undermine that rule by denying aggrieved taxpayers any relief or by fashioning a remedy which in application is purely prospective	3
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
CASES:	
American Trucking Assns, Inc. v. Smith, 496 U.S. 167 (1990)	3, 11
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)	2, 3
Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989)	1, 2, 12
James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439 (1991)	*passim*
McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990)	*passim*
STATUTES AND CONSTITUTIONAL PROVISIONS:	
U.S. Const. amend. XIV	6
Fla. Stat. 215.26(1) (1990)	8
O.C.G.A. § 3-4-60	9
O.C.G.A. § 48-2-35	2, 6, 9, 11
O.C.G.A. § 48-2-35(a)	7, 8, 9
Virginia Code 1950, § 58.1-1820 *et seq.*	5

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INTERESTS OF AMICUS CURIAE

The Amicus Curiae is James B. Beam Distilling Co., ("Beam"), Petitioner in *James B. Beam Distilling Co. v. Georgia*, 111 S.Ct. 2439 (1991) ("*Beam*"). Beam is in accord with the argument of Petitioner herein that this Court by its silence as to the retroactivity issue, applied its holding in *Davis v. Department of Treasury*, 489 U.S. 803 (1989) to the litigants then before it. Thus, pursuant to *Beam*, the rule in *Davis* must be applied to all other similarly situated litigants, including most obviously, Petitioners herein. However, there is yet another issue which is in need of clarification by this Court.

That is, the conduct of the State of Georgia[1] since the date this Court ruled in *Beam*, is illustrative of the extent to which the various states will go, without this Court's interpretive intervention at this stage, to avoid, indeed usurp, the retroactive application of this Court's decisions.

[1]As used herein, all references to the State of Georgia shall describe the State in its capacity as Respondent in *Beam*.

The force and effect of such usurpation is to deny Beam and other aggrieved taxpayers any relief whatsoever notwithstanding this Court's plain holdings in *Beam*, *Davis* and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) ("*McKesson*").

As will be more fully set forth hereinbelow, the State of Georgia has undertaken a course of conduct which is aimed at denying Beam any relief as a result of the State's unconstitutional taxing scheme. As a consequence, the State of Georgia has sought to undermine this Court's decision in *Beam* which held that Beam is entitled to retroactive treatment of this Court's decision in *Bacchus Imports, Ltd. v. Dias*, 468 U. S. 263 (1984) ("*Bacchus*").

Georgia's tactics are all the more alarming in light of its mandatory state refund statute, O.C.G.A. §48-2-35, which compels that all taxes collected pursuant to the invalid taxing scheme be returned to the taxpayers.

Without this Court's further clarification as to the remedies available to the class of litigants which are entitled to retroactive treatment of this Court's decisions, and perhaps more importantly, the state's absolute duty to actually provide a remedy, the State of Georgia and other states faced with such a duty, will fail and refuse to fulfill it. Such failure will not only exacerbate the discrimination which befell the taxpayers, but also negate entirely the force and effect of a finding of retroactivity. To utilize the remedy issue to divest the holding of substantive retroactivity of its meaning surely contravenes both *Beam* and *McKesson*.

ARGUMENT

ONCE THE QUESTION OF CHOICE OF LAW IS ANSWERED IN FAVOR OF PURE RETROACTIVITY, STATES CANNOT UNDERMINE THAT RULE BY DENYING AGGRIEVED TAXPAYERS ANY RELIEF OR BY FASHIONING A REMEDY WHICH IN APPLICATION IS PURELY PROSPECTIVE

Introduction

The pronouncement of this Court in *Beam* is clear; that is, inasmuch as the rule of law in *Bacchus* was applied to the parties then before the Court, principles of ". . . equality and *stare decisis* . . ." dictate that the rule must also be applied to all other litigants similarly situated to those in *Bacchus*. *Beam*, 111 S.Ct. at 2446. In other words, this Court applied *Bacchus* retroactively to the *Beam* litigants. It can be seen that Justice Souter, in his plurality decision in *Beam*, answered the "choice of law" question in favor of pure retroactivity. He then concluded that:

> ". . .[o]nce a rule is found to apply 'backward,' there may then be a further issue of remedies, *i.e.*, whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. Subject to possible constitutional thresholds, see *McKesson Corp. v. Florida Alcoholic Beverages and Tobacco Div.*, 496 U.S. __, 110 S.Ct. 2238, 110 L. Ed. 2d 17 (1990), the remedial inquiry is one governed by state law, at least where the case originated in state court. . ." *Beam*, 111 S.Ct. at 2443.

Therefore, it is essential as to the second step of Justice Souter's analysis (the first being a determination as to the choice of law) to consult *McKesson* for purposes of determining the parameters for fashioning the appropriate remedy in light of the illegal tax. Those parameters were explained in *American Trucking Assns, Inc. v. Smith*, 496

U.S. 167 (1990) ("*American Trucking*"), wherein Justice O'Connor, speaking for the plurality, of the Court stated that:

> "Our decision today in *McKesson* makes clear that once a State's tax statute is held invalid under the Commerce Clause, *the State is obligated* to provide relief consistent with federal due process principles. [Citation omitted] *When the State comes under such a constitutional obligation, McKesson establishes that equitable considerations play only the most limited role in delineating the scope of that relief.*" (Emphasis added.) *American Trucking*, 496 U.S. at 181.

Although it is true that the Court in *McKesson* listed a number of alternative remedies which *may* comport with federal due process principles in a particular case, the Court did not even hint that that list is all inclusive, or that one of the listed examples would necessarily comply with due process requirements in its application by a state.[2] Rather, the Court on remand merely provided the state court with hypothetical remedial examples for guidance purposes only.

It is important to note that the Court in *McKesson* did not address the issue of whether or not the State of Florida had a statutory mechanism in place which mandated what the remedy would be in the event an illegal tax was collected. Rather, since the question of remedy was found to be, in the first instance, one of state law, this Court without delving into the State's statutory makeup, merely directed the lower court to ensure that the victimized taxpayers be provided with *a remedy*. It was in that context that the Court listed a number of possible remedies the state court could consider.

[2]In fact, the Court in *McKesson* at footnote 23 explained that under some circumstances the imposition of back taxation of the favored class as a remedy may be ". . . so harsh and oppressive as to transgress the constitution limitation" depending on "the nature of the tax and the circumstances in which it is laid." *McKesson*, 496 U.S. at 40.

The State of Georgia would read this Court's silence in *McKesson* as to the existence of a refund statute like the one enacted in Georgia[3] to mean that the State is free to ignore it; that notwithstanding the presence of a long-standing remedial statute which contains unequivocal, unambiguous and mandatory language, it is unrestrained by this Court's teachings. In fact, the State would construe the unanimous *McKesson* decision as meaning that it can manufacture frivolous barriers, roadblocks and procedural gamesmanship to deny Beam a remedy of any kind. This course of conduct, if allowed to persist, can produce but one result; the Court's finding of retroactivity being rendered meaningless.

Like Georgia, there has been a refusal on the part of many states to follow this Court's holdings in *Beam* and *McKesson* as they pertain to the retroactive application of a substantive determination that a taxing scheme is illegal. This refusal is manifested by the continued denial of said states to provide a meaningful backward looking remedy. The conduct of the State of Georgia since this Court decided *Beam* is but one example.

Accordingly, it is the purpose of the Amicus to urge this Court, when deciding that the substantive rule invalidating a particular tax shall be applied retroactively, to also compel the taxing state to fashion a remedy which will not have the force and effect of turning the retrospective finding on its head. Stated another way, the Amicus believes it is imperative for this Court to clearly enunciate that a state cannot circumvent a holding of retroactivity by imposing a remedy which is in practical application only prospective and which is in derogation of any applicable state statutory remedy.

[3]The State of Virginia also has in place a refund statute. See Virginia Code 1950, § 58.1-1820 *et seq*.

McKesson's Doctrine Of A Meaningful Backward Looking Remedy

Once a determination is made, as in *Beam*, that a tax is invalid, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, obligates the State to provide "meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson*, 496 U.S. at 31. (footnote omitted). The plaintiff in *McKesson* challenged a Florida alcohol tax scheme that was very similar to the Georgia statute in *Beam* and the Hawaii statute at issue in *Bacchus*. The state courts in both *Beam* and *McKesson* had held their respective statutes to be unconstitutional under the Commerce Clause. However, neither state court granted retrospective relief holding instead that their decisions should be given prospective application only.

In *McKesson*, however, the unanimous United States Supreme Court held:

> [If] a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional. *McKesson*, 496 U.S. at 22.

Although this Court in *McKesson* explained that the "State is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined . . ." *Id.* at 51, 52 (footnote omitted) it also made clear that the "State is free, of course, to provide broader relief as a matter of state law than is required by the federal Constitution." *Id.* at 52 n.36. In the case of Georgia, it did so choose by enacting O.C.G.A. § 48-2-35, its

refund statute, which requires the return of the entire tax paid rather than merely the discriminatory portion thereof.

It was significant in *McKesson* that the Florida Legislature—like the Georgia Legislature—had not provided any pre-deprivation process for the exaction of taxes, establishing instead "various sanctions and summary remedies designed so that liquor distributors tender tax payments *before* their objections are entertained and resolved." *Id.* at 38 (emphasis in original, footnote omitted). Holding the absence of a pre-deprivation process for challenging the legality of the tax to mean that Florida "requires taxpayers to raise their objections to the tax in a post-deprivation refund action[,]" the Court then held that:

> ". . . in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the law is a meaningful one." *McKesson*, 496 U.S. at 39 (footnote omitted).

The Supreme Court then held that Florida could not, consistent with the due process requirements of the Fourteenth Amendment, refuse to grant the petitioner retroactive relief in the refund proceeding.[4] The Court remanded *McKesson* to the Florida Supreme Court "for further proceedings not inconsistent with this opinion." *Id.* at 2258. Nevertheless, those remanded proceedings are still pending some two years after this Court's decision, because of the State of

[4]The Court also made clear that there is no need for the taxpayer to pay under protest where the sole remedy is a post-deprivation refund statute. *McKesson*, 496 U.S. at 38 & n.21. The language of the Georgia refund statute is consistent with this principle, because it provides that a taxpayer is entitled to a refund regardless of "whether [the taxes were] paid voluntarily or involuntarily. . . ." O.C.G.A. § 48-2-35(a).

Florida's failure to not only fashion, but implement, a refund process.

In 1991, this Court in *Beam*, remanded to the state court the issue of remedy. Those proceedings still drag on because the state continues to deny *any liability* for the years 1982, 1983 and 1984, the period to which this Court held its decision retroactively applied. It is acutely disturbing that Georgia maintains this posture since it does so in the face of its own refund statute in which its Legislature crafted a remedy which is squarely applicable here. The Georgia Legislature has chosen a backward-looking remedy that is entirely consistent with the due process requirements set out in *McKesson*.[5] Section 48-2-35(a) of the Official Code of Georgia Annotated, the refund statute, prescribes the form that Georgia's "clear and certain" remedy "shall" take. Under O.C.G.A. § 48-2-35(a), "[a] taxpayer *shall* be refunded *any and all* taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state. . . ." (emphasis added).

Unless this Court's set of hypothetical remedies delineated in *McKesson* is to be understood as permitting a state to ignore, and hence, violate, its own statutory refund scheme in favor of one of the remedies so delineated, a full refund under Georgia's refund statute is the only "clear and certain" remedy that meets the *McKesson* standard that is available in Georgia.

[5]In fact, this case presents a stronger right to a refund than *McKesson* because the Georgia refund statute uses the mandatory "shall" while the Florida tax refund statute uses the less compelling "may". *Compare* O.C.G.A. § 48-2-35(a) *with* Fla. Stat. 215.26(1) (1990). *A fortiori* the taxpayer here is entitled to a refund. Thus, Georgia's choices in formulating the retrospective relief to which the taxpayer is entitled are more limited than the choices Florida had after *McKesson*. Furthermore, *McKesson* cannot be read as to require a state court to fashion a remedy where one already exists which comports which due process requirements.

The Georgia Legislature clearly contemplated that portions of its taxing scheme might be determined to be illegal; otherwise, the Legislature would have had no reason to enact the refund statute. The refund statute is not contingent in nature. It is not conditioned upon any act or finding other than that the tax in question was erroneously or illegally assessed or collected. Further, the statute is not elective; it is mandatory. It is not a remedy among a list of others, from which either the State or an aggrieved taxpayer may elect to implement. Nor does the statute provide an exception for the State's reliance upon a "belief" as to the legality of any particular taxing statute. To provide such an exception would be to deprive the statute of any degree of vitality, purpose or meaning since it could be reasonably assumed that the State would always argue that it "believed" its taxing scheme to be legal.

Since O.C.G.A. § 3-4-60, the statute which compelled the payment of the taxes in question, was in fact unconstitutional during 1982, 1983 and 1984, the State of Georgia, in the words of O.C.G.A. § 48-2-35(a), "erroneously or illegally assessed and collected" those taxes from Beam. The executive branch of the government of the State, therefore, under the Due Process Clause and Georgia's refund statute, is obligated—indeed, unequivocally ordered by the Georgia Legislature—to refund "any and all taxes" that Beam paid in 1982, 1983 and 1984. If Beam does not receive a full refund pursuant to this statute in this situation, O.C.G.A. § 48-2-35 can have no purpose, the will of the Legislature will have been thwarted and Beam will have been deprived of the "clear and certain" remedy to which it has a constitutional right. Such a result also usurps this Court's mandates in *Beam* and *McKesson* which usurpation cannot find sanction anywhere. The states of both Florida and Georgia continue to delay payment of any refund where in each instance, the amount in question can be readily determined. By their con-

tinued delay, they undermine the very threshold notion upon which the Supreme Court's decision in *Beam* is premised: "courts are understood only to find the law, not to make it." *Beam*, 111 S.Ct. at 2443.

A review of the history and current status of the *Beam* proceedings upon remand is illustrative of what will befall the Petitioners in the matter at bar unless this Court, in deciding in Petitioner's favor, also clarifies its holding in *McKesson* and *Beam* by finding that the remedy to be afforded the Petitioners is, in fact, that of a refund; that the only issue to be decided upon remand where the amount is not known, is the actual amount paid by the Petitioner under the illegal taxing scheme; and where the amount is known, for judgment to be entered thereupon.

Since the Court's remand of *Beam* to the Georgia Supreme Court, the matter has been further remanded to the Fulton Superior Court. The State persists in asserting in the court below so-called "remedial" issues that it claims are left to be decided. In truth, however, the only remaining task of the court is to enter judgment for Beam in the amount of the illegally collected tax just as surely as the trial court would have done in the initial refund action had it not been mistaken on the retroactivity issue. The State's so-called new allegations and purported defenses which it argues are in conformity with issues this Court left unanswered in *Beam*, point out the need for the Court's intervention; for in realty, the State's defense to a refund is, at bottom, frivolous and not warranted by law.

Georgia has now alleged that the relief sought by Beam is barred due to so-called "reliance interests" of the State and based upon principles of equity and justice. The State of Georgia has asserted that it did not erroneously or illegally assess or collect the taxes in the first instance and that the refund

sought is barred because the rule of law was not clearly foreseen by the State. As a result, the State alleges that a refund would produce substantial hardships upon the State.

It must be remembered that this Court held in *American Trucking* that "[o]nce a constitutional decision applies and renders a tax invalid, due process, not equitable considerations, will generally dictate the scope of relief offered."[6] *American Trucking*, 496 U.S. at 194. From a practical standpoint, Georgia's conduct can be seen as little more than an attempt to delay its duty to provide a *McKesson*-type remedy, all at the extreme expense of Beam and the taxpayers of the State. The huge cost to Beam does nothing other than exacerbate the discrimination it suffered under Georgia's illegal taxing statute since the favored taxpayers are not faced with the delay and costs associated with seeking a refund. Notwithstanding the fact that Beam prevailed in its constitutional challenge to O.C.G.A. § 48-2-35, the State of Georgia is making Beam fight that battle again. This Court in *Beam* and *McKesson* could not have intended such a result.

As can be seen, a determination in favor of Petitioners herein and a remand for purposes of a remedy must also include a clear direction by this Court to the effect that in those cases where a state statutory remedy is in place, like Georgia's refund statute, the minimum remedy to be afforded in the face of the imposition of an illegal tax is compliance with said statute. In the case of Beam and Petitioners herein, a refund of the amount of the illegal tax paid, including that paid during any retroactive period to which the substantive holding of illegality is applied, is mandated. Otherwise, the state of Virginia, as well as Florida, Georgia,

[6]The Georgia refund statute does contain a three-year statute of limitations so as to minimize the burden upon the State in the face of a tax which is found to be illegal.

and of course others, thwart this Court's holdings and deny the class of aggrieved taxpayers the single most effective remedy which comports with due process *i.e.*, a refund.

CONCLUSION

For the reasons stated, this Court should reverse the holding of the Virginia Supreme Court that *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989) be given purely prospective application thereby denying Petitioners refunds of unconstitutional state taxes. Further, this Court should direct that once the question of choice of law is answered in favor of pure retroactivity, states must not undermine that rule by (i) denying aggrieved taxpayers any relief; (ii) by fashioning a remedy which in application is purely prospective; or (iii) by fashioning a remedy in derogation of any applicable state statutory remedy.

Respectfully submitted,

Counsel of Record
MORTON SIEGEL
MICHAEL A. MOSES
RICHARD G. SCHOENSTADT
JAMES L. WEBSTER
SIEGEL, MOSES, SCHOENSTADT
& WEBSTER
10 East Huron
Chicago, Illinois 60611
(312) 664-8998

JOHN L. TAYLOR, JR.
VINCENT, CHOREY, TAYLOR
& FEIL
A Professional Corporation
Suite 1700
The Lenox Building
3399 Peachtree Road, N.E.
Atlanta, Georgia 30326
(404) 841-3200

Attorneys for the Amicus Curiae